

USA v. Alcantara-Rueda, 03-50103**NOV 14 2003**

BERZON, J., concurring in part and dissenting in part:

CATHY A. CATTERSON
U.S. COURT OF APPEALS

I concur in the remainder of the disposition, but not in the conclusion that the district court properly declined to recuse himself after engaging in ex parte communications with the attorney for the government. There was, to my mind, an appearance of impropriety requiring recusal, not because of the content of the conversation between the judge and the government's lawyer but because the judge instigated the conversation at all.

The government had agreed to a sentence of which the district judge evidently disapproved, as evidenced by his later refusal to follow the government's recommendation against use of the aggravated assault guideline. See USSG §2A2.2. The judge's law clerk had called the government lawyer to ascertain which witnesses the government would have available for the sentencing hearing and what they would testify to, and obtained that information. Then the district judge got on the line to speak with the government lawyer. By doing so, without any later explanation for the necessity of doing so, the district judge engaged in behavior open to the appearance that he was attempting, through his actions if not his words, to convey his discontent with the government's position and urge the government to take an active role at the sentencing hearing.

Otherwise, why did he get on the telephone? It is apparent from the later sentencing hearing that the district judge was indeed annoyed with the government for refusing to put on witnesses itself regarding the aggravated assault guideline.

I would order the district judge recused and remand for a new sentencing hearing before a different judge.